

**SB 882 - If passed would:**

- Reverse a 2006 Supreme Court ruling that ignored the intent of Michigan's Legislature;
- Re-establish the law as stated in *Witherspoon v. Guilford* (1994);
- Re-establish all previous statutes of limitations for the construction industry;
- Re-establish stability in the law for the design & construction industry;
- Promote Michigan's long-standing policy against dilatory plaintiffs and stale claims;
- Make Michigan a better place to build and conduct business.

Primary Sponsor – Sen. Alan Sanborn

**The Problem (Overview):** In 2006, the Michigan Supreme Court issued its ruling in *Ostroth v. Warren Regency*, 474 Mich. 36; 709 N.W.2d 589 (2006). *Ostroth* changed the existing law and significantly lengthened all statutes of limitations for the design and construction industry. The longer statutes of limitations created by the Court do not reflect the original intent of the Legislature and directly contradict Michigan's strong public policy of preventing stale claims. Further, the ruling creates new confusion and instability in the legal environment for the construction industry, because *Ostroth* leaves completely open the question of when the statute begins to run for claims on incomplete projects.

**Legislative Intent Ignored:** For 100 years in Michigan, the statute of limitations for architectural/engineering malpractice has been 2 years, running from the date of the last professional services rendered. Negligence claims against contractors have long been subject to a three-year statute of limitations. The *Ostroth* Court inappropriately repealed these statutory periods, and doubled, tripled and even quadrupled the statute of limitations for many claims. The Legislature *never* intended to *expand* the risk of exposure to stale claims. The Legislature has instead expressed an intention to set additional and reasonable protections for the industry.

**Limitations and Repose:** 40 years ago, the law was changing and the legal barrier of privity began eroding. Liability exposure for architects and engineers therefore expanded. The Legislature responded, and continued Michigan's strong public policy against stale claims, by enacting the "architects and engineer's statute" which established a 6-year statute of repose, MCL 600.5839. The statute of repose did not repeal any existing limitations periods, but was intended to work in concert with the existing statutes of limitations, found in MCL 600.5805. Contractors were later included within the protections of the statute of repose, by amendment.

**Witherspoon v. Guilford:** The well-reasoned case of *Witherspoon v. Guilford*, 203 Mich. App. 240; 511 N.W.2d 720 (1994,) explained how the various statutes of limitation of MCL 600.5805 and the 6-year statute of repose established by MCL 600.5839 were intended to work together to protect architects, engineers, contractors and surveyors from stale claims. *Witherspoon* is correct because it followed the original intent of the Legislature and advanced sound policy.

**Ostroth v. Warren Regency:** The *Ostroth* Court confused the concepts of limitations and repose, and failed to follow Legislative intent. *Ostroth* changed all limitations periods in the construction industry to 6 years from the date of first use, occupancy or acceptance of the improvement. In trying to "fit a square peg in a round hole," the *Ostroth* Court has allowed plaintiffs to knowingly sit on their rights for many years, and eliminated all limitations periods for claims arising from incomplete projects, thus creating a new and unresolved gap in the law. The *Ostroth* court directly overruled Michigan's long-standing policy to bar "stale claims." *Ostroth* has made Michigan a riskier and more costly place to build. SB 882 would reverse *Ostroth* and re-establish our previous long-standing law, protecting the construction industry from stale claims.

# ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES

## Statutes of Limitations

State	Statute of Limitations (years)
Alabama	2
Alaska	1
Arizona	1
Arkansas	1
California	
Colorado	2
Connecticut	1
Delaware	2
Florida	4
Georgia	2
Hawaii	2
Idaho	2
Illinois	4
Indiana	2
Iowa	
Kansas	2
Kentucky	No law
Louisiana	1
Maine	4
Maryland	3
Massachusetts	3
Metro Washington	3
Michigan	6
Minnesota	
Mississippi	3
Missouri	5
Montana	3
Nebraska	4
Nevada	
New Hampshire	3
New Jersey	2
New Mexico	3
New York	3 (does not apply to third party suits)
North	

<b>Carolina</b>	
<b>North Dakota</b>	
<b>Ohio</b>	2
<b>Oklahoma</b>	2
<b>Oregon</b>	2
<b>Pennsylvania</b>	2
<b>Rhode Island</b>	3
<b>South Carolina</b>	3
<b>South Dakota</b>	3
<b>Tennessee</b>	1
<b>Texas</b>	2
<b>Utah</b>	
<b>Vermont</b>	3
<b>Virginia</b>	2
<b>Washington</b>	3
<b>West Virginia</b>	2
<b>Wisconsin</b>	3
<b>Wyoming</b>	4

**Statute of Repose:** Statutes of repose bar actions against architects and engineers after a specified period of time following the completion of services or the substantial completion of construction.

**Statute of Limitations:** Statutes of limitations bar actions against architects and engineers after a specified period of time following an injury or discovery of a deficiency.

It is important to have both a statute of repose and a statute of limitations. Without a statute of repose, a design professional's exposure to a claim could theoretically run indefinitely, since an injury or the discovery of a deficiency could occur at any time. Statutes of repose and limitations work together to limit the total period of time during which the architect or engineer is exposed to liability.

**EXHIBIT 1      HISTORY OF MCL 600.5839**

**EXHIBIT 2      MCL 600.5805**

**EXHIBIT 3      MCL 600.5839**

**EXHIBIT 4      *OSTROTH V. WARREN REGENCY***

**EXHIBIT 5      *WITHERSPOON V. GUILFORD***

**EXHIBIT 6**

## EXHIBIT 1

## HISTORY OF MCL 600.5839 – "THE ARCHITECT'S AND ENGINEER'S STATUTE"

### 1898 – 1967 : Architectural Negligence held to be Malpractice

It has long been the law in Michigan that the responsibility of an architect does not differ from that of a lawyer or physician, so a claim against an architect is a claim that the architect failed to meet the professional standard of care. Bayne v Everham, 197 Mich. 181 at 199-200; 163 N.W. 1002 (1917) (citing to Chapel v Clark, 117 Mich 638; 76 NW 62 (1898); see also, Borman's v Lake State Dev Co, 60 Mich App 175, 182; 230 NW2d 363 (1975)). Note that during the 19<sup>th</sup> and early 20<sup>th</sup> Century, engineering was encompassed in the practice of architecture, so no cases are found specifically describing "engineering malpractice." The earliest case appears to be Chapel v. Clark reported in 1898. It may be noted however that the allegations against the architect in Chapel include claims that clearly address civil and mechanical engineering.

Michigan courts have specifically held that the general malpractice statute applies to architects. Midland v Helger, 157 Mich App 736; 403 N.W.2d 218 (1987). The Michigan Court of Appeals in Midland v Helger Construction Company, 157 Mich App 736, 741 (1987) held that the two-year statute of limitations found in §5805 "applies to architects as well as to health care professionals." See also, Sam v Balardo, 411 Mich 405, 425-427; 308 NW2d 142 (1981); Chapel v Clark, 117 Mich 638, 640; 76 NW 62 (1898). These ruling logically apply to engineers as well.

The rule of the common law was that in order to bring a claim against an architect or engineer, the plaintiff must be "in privity" with the design professional. This rule limited the architect's risk to claims by its clients, until the mid-twentieth century.

### 1967: Enactment of the "Architects and Engineers' Statute"

In the late 1950's and 1960's the privity barrier began to erode. This development expanded the scope of liability exposure for architects and engineers. In response to the new legal environment, the Michigan legislature enacted **MCL 600.5839**, which established a period of repose, so that six years after use, occupancy or acceptance of an improvement to real property, no claims arising out of defective and unsafe condition of an improvement could accrue. In enacting **MCL 600.5839**, the Legislature did not express any intention to abrogate the *existing* statutes of limitations that applied to Architects and Engineers.

The history of **MCL 600.5839** was explained by the Michigan Supreme Court:

"The instant legislation was enacted in 1967 in response to then recent developments in the law of torts. The waning of the privity doctrine as a defense against suits by injured third parties [n13] and other changes in the law [n14] increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvements, perhaps many years after construction of the improvement was completed. The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability or cost of the services they provided." *O'Brien v Hazelet & Erdal*, 410 Mich. 1, 14; 299 N.W.2d 336 (1980).

There has never been any controversy about the original intent of the Legislature, which was to add, not subtract, protections against stale claims.

### 1967-1986: Contractors Not Protected

Originally, **MCL 600.5839's** protection applied only to design professionals, but *not* to general contractors or subcontractors. Michigan contractors could therefore be sued

for claims of ordinary negligence and breach of contract many years after project completion, because a claim accrues on the date on which the damages first occurred to the plaintiff and the cause of action was complete. Connelly v Paul Ruddy's Equipment Repair & Service Company, 388 Mich.146; 200 N.W.2d 70 (1972).

For example, in American States Insurance Company v Employees Mutual, 352 F. Supp. 197 (1972) a fire occurred (allegedly caused by defective electrical wiring) eight years after project completion. Because the claim accrued only when the fire occurred, the plaintiff was allowed to proceed with its claim, which was not filed until more than nine years after project completion. In accord, see Cartmell v Slavik, 68 Mich. App. 202; 242 N.W.2d 66 (1976), where the plaintiffs' claim of defective workmanship against the contractor was allowed to proceed, even though suit was filed sixteen years after project completion. Also in accord, see Filcek v Utica Building Co., 131 Mich. App. 396; 345 N.W.2d 707 (1984), the plaintiff filed suit thirteen years after project completion, claiming negligent construction. In Filcek, the Court of Appeals found the "discovery rule" was applicable, reversed the lower court's grant of summary disposition based on the statute of limitations, and remanded the case for trial, leaving the issue of "when the defect should reasonably have been discovered" to the jury.

This state of the law led to a circumstance where a claim, which first accrued more than six years after use, occupancy or acceptance of the improvement, could be pursued against the project contractors, but not against the project Architects or Engineers. Plaintiffs and contractors eventually challenged the constitutionality of MCL 600.3539 on due process and equal protection grounds.

### 1979 - 1985: Constitutional Challenges to MCL 600.5839

The constitutional challenges to § 5839 led to the consolidation of four cases before the Michigan Supreme Court,<sup>1</sup> and in 1980, O'Brien v Hazelet & Erdal, 410 Mich. 1; 299 N.W.2d 336 (1980) was decided. In each of the four cases, the plaintiffs suffered injuries more than six years after use, occupancy or completion, so the design professionals received the protections of MCL 600.5839, but the contractors did not. The O'Brien Court specifically set out the questions for decision:

We granted leave to appeal in these four cases to resolve whether MCL 600.5839(1); MSA 27A.5839(1) "[violates] equal protection of the law or due process guarantees (a) in denying a cause of action to persons allegedly injured from negligent design or supervision of construction by state-licensed architects or professional engineers completed more than six years before the injury; and (b) by limiting the tort responsibility of licensed architects and professional engineers but not licensed contractors." O'Brien at 12-13.

The O'Brien Court analyzed the foregoing questions under both the due process and equal protection tests, and found MCL 600.5839(1) to be constitutional. The O'Brien defendants argued that MCL 600.5839 violates equal protection (1) by singling out the victims of the negligence of architects and engineers for a burden not imposed upon the victims of other tortfeasors, and (2) by failing to extend the same protection to others who may be responsible for defects in improvements to real property -- particularly contractors, who may be contractually obligated to follow the directives of architects and engineers, yet after six years find themselves the only available target for

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<sup>1</sup> The four consolidated cases were: O'Brien v Hazelet & Erdal, 84 Mich. App. 764; 270 N.W.2d 690 (1978); Muzar v Metro Town Houses, Inc., 82 Mich. App. 368, 379-380; 266 N.W.2d 850 (1978); Bouser v Lincoln Park, 83 Mich. App. 167; 268 N.W.2d 332 (1978); and Oole v Oosting, 82 Mich. App. 291; 266 N.W.2d 795 (1978).

plaintiffs alleging injury resulting from latent defects. The Court held the statute passed constitutional requirements:

"The Legislature could rationally determine that state-licensed architects and engineers possess characteristics which reasonably distinguish them with respect to the object of the legislation. \*\*\* O'Brien at 30.

A final constitutional challenge to **MCL 600.5839** was raised in Cliffs Forest Products v Al Disdero, 144 Mich. App. 215; 375 N.W.2d 397 (1985). In Cliffs, the plaintiff's injury occurred more than six years after completion, so the architect received protection from **MCL 600.5839**, but the contractors did not. In addition to raising the same arguments that had been rejected in O'Brien, the Cliffs defendant argued that **MCL 600.5839** violated the title-object clause of the Michigan Constitution 1963, Art. 4, § 24. The Court rejected the argument, finding first that the issue was not raised in the trial court, and second, that even if the Court were to consider the argument, the statute met constitutional requirements. Cliffs at 220-221.

#### 1986: Contractors Gain Protection

Once the constitutionality of **MCL 600.5839** had been settled, in 1985 (effective March 31, 1986), the Legislature amended § 5839 to include construction contractors in its protections, as well. In enacting the amendment, the Legislature did not express any intention to abrogate the *existing* statutes of limitations applicable to contractors.

#### 1986-1988: Protection Limited to Third Party Claims

Soon, however, a new question regarding the application of **MCL 600.5839** arose: Whether the legislature intended the statute of repose to apply to *all* claims arising out of the defective and unsafe condition of an improvement to real property, or only to third party tort claims. The history of **MCL 600.5839**, as reviewed in O'Brien, suggested that

the statute was intended to counter the expansion of liability brought about by the erosion of the barrier of privity. Therefore, in City of Marysville v Pate, Hirn & Bogue, Inc., 154 Mich. App. 655; 397 N.W.2d 859 (1986) the plaintiff argued that contract claims from project owners were not intended to be effected.

The Marysville court, after referencing the history of the statute set forth in O'Brien, found that MCL 600.5839 did not apply to the owner's claims:

"...the statute was enacted primarily to limit the engineers' and architects' exposure to litigation by injured third persons as evidenced by the legislation's timing and relation to case law. However, the Legislature never intended this statute to fix the period of limitation in which an owner of an improvement to real property must bring an action against the architect or engineer for professional malpractice committed in the planning or building of the improvement which results in deficiencies to the improvement itself." Marysville at 660.

Subsequently, Courts in Burrows v Bidiqare/Bublys, 158 Mich. App. 175; 404 N.W.2d 650 (1987) and Midland v Helgar, 157 Mich. App. 736; 403 N.W.2d 218 (1987) likewise held that MCL 600.5839 was not applicable to "a suit for deficiencies in an improvement itself," brought by the owner of the project. Burrows at 182; Midland at 741. However, Judge Burns, dissenting in Burrows, criticized the statutory interpretation set forth in Marysville:

"I disagree with the majority and with the panel in Marysville v Pate, Hirn & Bogue, Inc., 154 Mich App 655; 397 NW2d 859 (1986), that a distinction should be made between a suit for injuries "arising out of" an architectural defect and a suit "for the defect" itself.

First, the statute explicitly applies to actions to recover damages for any injury to property, real or personal, arising out of a defective condition of an improvement. Such broad language indicates the Legislature's intent to make the statute applicable to any action for damages when defective building design is involved." Burrows at 191-192.

### 1988: The Legislative Response to *Burrows*

In 1988, the Michigan legislature enacted 1988 PA 115, effective May 1, 1988, amending MCL 600.5805, adding subsection (10), which stated:

"The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839."

In *Michigan Millers v West Detroit Building Company*, 196 Mich. App. 367; 494 N.W.2d 1 (1992), a case in which the injury occurred eight years after project completion and the suit was filed nine years after project completion. Both contractor defendants argued that the decisions in *Marysville*, *Burrows* and *Midland* were effectively overruled by the addition of subsection (10) to MCL 600.5805, and that the Legislature intended to eliminate any difference between third-party claims and claims made by owners against an architect, engineer, or contractor. After a thorough review of the rules of statutory construction, the *Michigan Millers* court found that the language of MCL 600.5805(10) was "not clear and unambiguous, because reasonable minds could differ concerning whether § 5805(10) clearly specifies the applicable limitation period." *Michigan Millers* at 374.

The *Michigan Millers* court, after reviewing the available evidence as to legislative intent and applying the rules of statutory construction, held:

"That the Legislature may have inartfully expressed its intent and could have chosen more suitable alternatives to accomplish its purpose does not alter the fact that the Legislature sought to set aside this Court's holdings in *Marysville*, *Midland*, and *Burrows*." *Michigan Millers* at 377.

Michigan Millers clearly held that the legislative intent behind new **5805(10)**<sup>3</sup> was to eliminate the previous distinction courts had recognized between claims brought pursuant to contract rights by owners and tort claims brought by third parties. After the enactment of **§ 5805(10)**, all claims against architects, engineers and contractors arising out of the defective and unsafe condition of an improvement to real property were subject to the restrictions of **MCL 600.5839**. In enacting **MCL 600.5805(10)**, the Legislature did not express any intention to abrogate the *existing* statutes of limitations that applied to design professionals and contractors, and the Michigan Millers court did not note any such intention.

**1994: Witherspoon v Guliford**

Up until 1994, no reported cases had specifically addressed the question of how **§ 5839** and **§ 5805** were intended to interact. All previous legal challenges involved disputes where the claim either accrued, or was filed after, the six-year period of repose had expired. Therefore, this issue presented in the instant case was not analyzed by the Courts until 1994, in Witherspoon, a case against a construction contractor.

In Witherspoon, the Plaintiff's decedent was killed as a consequence of an auto accident where his car left the road and struck a guardrail which the Plaintiff alleged was defective. The Defendant construction company had completed the installation of the guardrail in October of 1988. The Plaintiff's injuries occurred within a month of project acceptance, but the complaint was not filed until just over 3 years later on November 7, 1991. The Defendant moved for Summary Disposition on the strength

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<sup>3</sup> Now **§ 5805(14)**.

of the 3 year negligence statute of limitations set out at **MCLA 600.5805(8)**.<sup>4</sup> The Plaintiff countered that the 6-year period set out in **MCLA 600.5839** was a specific statute with fixed application to architects, engineers and contractors, and that it accordingly controlled over the general provisions set out in **MCLA 600.5805(8)**. Unquestionably, Witherspoon was a case of first impression.

Relying on O'Brien and Michigan Millers, the Witherspoon Court found that the Legislature did not intend to abrogate the effect of the general statutes of limitations by the enactment of § 5839, and that § 5805 and § 5839 can be and must be read harmoniously. Witherspoon at 246-247. A traditional accrual analysis was employed, and the plaintiff's negligence claims were deemed time barred since they were not brought within three years of the date of accrual pursuant to **MCLA 600.5805(8)**. The Court noted that where a claim did not accrue *within* six years of the date of use, occupancy or acceptance of the completed improvement, it was time barred by the repose effect of **MCLA 600.5839**, but that the repose statute did not "breath new life" into claims that were barred by operation of the general statutes of limitations.

The Witherspoon Court correctly drew a distinction between the "limitations" and "repose" periods set forth by the statutes. Witherspoon identified the "statute of limitations" period as that running from the date of the accrual of a claim to the end of the period as prescribed by § 5805. Witherspoon also identified the "statute of repose" period as that period of time running for six years from the date of first use, occupancy or acceptance of the improvement, after which no claim could accrue.

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<sup>4</sup> The applicable statute of limitations for negligence against contractors was (and is) three years. § 5805(8) (now § 5805(10)).

Thus, Witherspoon presented a harmonious reading of the two statutes, giving effect to all of the terms of both, and advancing the policies the statute was intended to promote. The analysis of the Witherspoon Court has since been applied to all the defendant groups protected by MCL 600.5839, being architects, engineers, land surveyors and contractors.

**2004: Ostroth v Warren Regency (Court of Appeals)**

On July 8, 2004, The Michigan Court of Appeals, in Ostroth v Warren Regency, G.P., L.L.C 263 Mich. App. 1 (2004), faced the same issue that was presented in Witherspoon. However, rather than follow controlling authority, the Ostroth panel cast Witherspoon completely aside and concluded that MCLA 600.5839 was the only statutory section that could apply. The Court of Appeals designated the six-year period, running from the date of first use, occupancy or acceptance, as both the "statute of limitations" period and the "repose" period. The Court of Appeals Ostroth panel did not address the issue of accrual.

On August 29, 2004, Defendant / Appellant, Edward Scholak, Hobbs & Black, Inc., filed an Application for Leave to Appeal from the decision of the Court of Appeals, which was granted in Ostroth v. Warren Regency, 472 Mich. 898; 696 N.W.2d 708; 2005. The Court invited interested parties to apply for leave to file briefs *amicus curiae*.

**2006: Ostroth v Warren Regency (Michigan Supreme Court)**

The design and construction industry responded to the Court's invitation to participate, by expressing its broad opposition to the Ostroth Court's re-interpretation of the statute. *Amicus curiae* supporting the Witherspoon reading of the statute included: American Institute of Architects, Michigan Chapter; ACEC/Michigan, Inc.; Southeastern

Michigan Chapter NECA, Inc.; Michigan Roofing Contractors Association, Inc.; Southeastern Michigan Roofing Contractors Association, Inc.; Associated General Contractors of America Greater Detroit Chapter, Inc.; Michigan Chapter Associated General Contractors of America, Inc.; Integrated Designs, Inc.; Construction Association of Michigan; Sheet Metal & Air Conditioning Contractors National Association; Great Lakes Fabricators and Erectors Association; Plumbing and Mechanical Contractors of Detroit; and GMB Architects-Engineers, Inc.

Nonetheless, the Supreme Court affirmed the Court of Appeals.

**SUMMARY OF RELEVANT  
STATUTORY SECTIONS**

**§ 600.5805. Injuries to persons or property;**

Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

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(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

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(14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

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**§ 600.5827. Accrual of claim.**

Sec. 5827. Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

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**§ 600.5838. Claim based on malpractice; accrual; commencement of action; burden of proof; limitations.**

Sec. 5838. (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

(2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

**§ 600.5839. Limitation of actions against licensed architect, professional engineer,**

contractor, or licensed land surveyor; definitions; applicability of subsection (1).

Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

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## **EXHIBIT 2**

CHAPTER 600 REVISED JUDICATURE ACT OF 1961  
REVISED JUDICATURE ACT OF 1961  
CHAPTER 58. LIMITATION OF ACTIONS

*MCLS § 600.5805 (2007)*

§ 600.5805. Injuries to persons or property; limitations; "dating relationship" defined.

Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(2) The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.

(3) The period of limitations is 5 years for an action charging assault or battery brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided. This limitation applies to causes of action arising on or after February 17, 2000 and to causes of action in which the period of limitations described in subsection (2) has not already expired as of February 17, 2000.

(4) The period of limitations is 5 years for an action charging assault and battery brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship. This limitation applies to causes of action arising on or after January 1, 2003 and to causes of action in which the period of limitations described in subsection (2) has not already expired as of January 1, 2003.

(5) The period of limitations is 2 years for an action charging malicious prosecution.

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

(7) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.

(8) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.

(9) The period of limitations is 1 year for an action charging libel or slander.

(10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

(11) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided. This limitation applies to causes of action arising on or after February 17, 2000 and to causes of action in which the period of limitations described in subsection (10) has not already expired as of February 17, 2000.

(12) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship. This limitation applies to causes of action arising on or after January 1, 2003 and to causes of action in which the period of limitations described in subsection (2) has not already expired as of January 1, 2003.

(13) The period of limitations is 3 years for a products liability action. However, in the case of a product that has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

(14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

(15) As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

**HISTORY:** Act 236, 1961, p 418; by § 9911 eff January 1, 1963.

Pub Acts 1961, No. 236, Ch. 58, § 5805, by § 9911 eff January 1, 1963; amended by Pub Acts 1978, No. 495, imd eff December 11, 1978 (see 1978 note below); 1986, No. 178, imd eff July 7, 1986, by § 2 eff October 1, 1986 (see 1986 note below); 1988, No. 115, imd eff May 2, 1988; 2000, No. 2, imd eff February 17, 2000 (see 2000 note below); 2000, No. 3, imd eff February 17, 2000 (see 2000 note below); 2002, No. 715, eff March 31, 2003 (see Mich. Const. note below).

## **EXHIBIT 3**

CHAPTER 600 REVISED JUDICATURE ACT OF 1961  
REVISED JUDICATURE ACT OF 1961  
CHAPTER 58. LIMITATION OF ACTIONS

*MCLS § 600.5839 (2007)*

§ 600.5839. Limitation of actions against licensed architect, professional engineer, contractor, or licensed land surveyor; definitions: applicability of subsection (1).

Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

(2) No person may maintain any action to recover damages based on error or negligence of a state licensed land surveyor in the preparation of a survey or report more than 6 years after the delivery of the survey or report to the person for whom it was made or the person's agent.

(3) As used in this section, "state licensed architect or professional engineer" or "state licensed land surveyor" means any individual so licensed, or any corporation, partnership, or other business entity on behalf of whom the state licensed architect, professional engineer, or land surveyor is performing or directing the performance of the architectural, professional engineering, or land surveying service.

(4) As used in this section, "contractor" means an individual, corporation, partnership, or other business entity which makes an improvement to real property.

(5) The amendments to subsection (1) added by this amendatory act shall not apply to any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of an improvement if, prior to the effective date of this amendatory act, 6 or more years have expired after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

(6) The changes to subsection (1) made by this 1985 amendatory act shall apply only to a cause of action which accrues on or after the effective date of this 1985 amendatory act and shall not apply to a cause of action which accrues before the effective date of this 1985 amendatory act.

**HISTORY:** Act 236, 1961, p 418; by § 9911 eff January 1, 1963.

Pub Acts 1961, No. 236, Ch. 58, § 5839, as added by Pub Acts 1967, No. 203, eff November 2, 1967; amended by Pub Acts 1985, No. 188, eff March 31, 1986.

## **EXHIBIT 4**

ELLEN M. OSTROTH and THANE OSTROTH, Plaintiffs, and JENNIFER L. HUDOCK and BRIAN D. HUDOCK, Plaintiffs-Appellees, v WARREN REGENCY, G.P., L.L.C., AND WARREN REGENCY LIMITED PARTNERSHIP, Defendants, and EDWARD SCHULAK, HOBBS & BLACK, INC., Defendant-Appellant.

No. 126859

SUPREME COURT OF MICHIGAN

474 Mich. 36; 709 N.W.2d 589; 2006 Mich. LEXIS 197

October 19, 2005, Argued

February 1, 2006, Decided

February 1, 2006, Filed

**PRIOR HISTORY:** [\*\*\*1] Macomb Circuit Court, Mark S. Switalski, J. The Court of Appeals, SMOLENSKI, P.J., and WHITE and KELLY, JJ. Supreme Court granted leave to appeal. *Ostroth v. Regency*, 263 Mich. App. 1, 687 N.W.2d 309, 2004 Mich. App. LEXIS 1878 (2004).

**COUNSEL:** *Donnelly W. Hadden, P.C.* (by *Donnelly W. Hadden*), and *Ball & Ball, LLP* (by *Betie K. Ball*), for Jennifer L. and Brian D. Hudock.

*Sullivan, Ward, Asher & Patton, P.C.* (by *Ronald S. Lederman*), for Edward Schulak, Hobbs & Black, Inc.

Amici Curiae:

*Thomas M. Keranen & Associates, P.C.* (by *Frederick F. Butters*), for American Institute of Architects, Michigan.

*Kerr, Russell and Weber, PLC* (by *James R. Case, Joanne Geha Swanson, and Michael A. Sneyd*), for ACEC/Michigan, Inc.; Southeastern Michigan Chapter NECA, Inc.; Michigan Roofing Contractors Association, Inc.; and Southeastern Michigan Roofing Contractors Association, Inc.

*Thomas M. Keranen & Associates, P.C.* (by *Thomas M. Keranen and Peter J. Cavanaugh*), for Associated General Contractors of America Greater Detroit Chapter, Inc., and Michigan Chapter Associated General Contractors of America, Inc.

*Thomas M. Keranen & Associates, P.C.* (by *Gary D. Quesada*), for Integrated Designs, [\*\*\*2] Inc.

*Floyd E. Allen & Associates* (by *Corey D. Grandmaison*) for Ecorse Board of Education.

*Sullivan, Ward, Asher & Patton, P.C.* (by *Michael J. Asher*), for the Construction Association of Michigan,

Sheet Metal & Air Conditioning Contractors National Association, Great Lakes Fabricators and Erectors Association, and Plumbing and Mechanical Contractors of Detroit.

*Sullivan, Ward, Asher & Patton, P.C.* (by *Christopher B. McMahon*), and *Thomas M. Keranen & Associates, P.C.* (by *Gary D. Quesada*), for GMB Architects-Engineers, Inc.

**JUDGES:** Chief Justice: Clifford W. Taylor. Justices: Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, KELLY, J. (concurring).

**OPINION BY:** Elizabeth A. Weaver

**OPINION**

[\*38] [\*\*591] BEFORE THE ENTIRE BENCH  
WEAVER, J.

This architectural malpractice case poses the issue whether MCL 600.5839 is only a statute of repose, in which case MCL 600.5805(6) or (10) supplies a shorter limitations period, or is itself both a statute of repose and a statute of limitations. The Court of Appeals [\*\*\*3] concluded that § 5839 is both a statute of repose [\*39] and a statute of limitations and thus the plaintiff's cause of action is not time-barred.<sup>1</sup> We agree and accordingly affirm that decision and remand the matter to the circuit court.

<sup>1</sup> 263 Mich. App. 1; 687 N.W.2d 309 (2004).

**FACTS**

In April 1998, defendant Edward Schulak, Hobbs & Black, Inc., architects and consultants, was the architect in a renovation project, designing renovations for office spaces at 12222 East Thirteen Mile Road in Warren, Michigan. Plaintiff Jennifer L. Hudock worked in the offices from April 24, 1998, through August 24, 1998.

Plaintiff alleges that during that time she was exposed to environmental hazards such as fungus, mold, bacteria, formaldehyde, and carbon dioxide as a result of the renovations to the building's heating, cooling, ventilation, and plumbing systems. She claims that she sustained personal injuries as a result of environmental hazards arising from the renovation of her workplace.<sup>2</sup>

2 Plaintiff's husband's claim is derivative. The other plaintiffs in this case, Ellen M. and Thane Osroth, and two other defendants, Warren Regency, G.P., L.L.C.; and Warren Regency Limited Partnership, are not parties to this appeal.

[\*\*4] Plaintiff initiated this action for damages on May 10, 2000. In her first amended complaint filed November 14, 2000, plaintiff alleged that defendant-architect negligently exposed plaintiff to a hazardous environment that caused injury and increased the risk of injury in the future. Defendant first moved for summary disposition, challenging the merits of plaintiff's claim. The circuit court then allowed defendant to amend its affirmative defenses to include the claim that plaintiff's suit was time-barred by the two-year limitations period of MCL 600.5805(6).

[\*40] The circuit court granted defendant's motion for summary disposition, holding that the two-year limitations period for malpractice claims of MCL 600.5805(6) applied. However, the Court of Appeals affirmed in part, reversed in part, and remanded the matter to the circuit court, holding that the six-year limitations period of MCL 600.5839(1) applies to plaintiff's action for damages.

[\*\*592] We granted defendant's application for leave to appeal and directed that the parties include among the issues to be briefed

(1) whether MCL 600.5839(1)

[\*\*5] precludes application of the statutes of limitations prescribed by MCL 600.5805 and, if not, (2) which statute of limitations, MCL 600.5805(6) or MCL 600.5805(10), is applicable to the claim asserted against defendant Edward Schulak, Hobbs & Black, Inc., in this case. [']

3 472 Mich. 898, 696 N.W.2d 708 (2005).

#### STANDARD OF REVIEW

This Court reviews de novo a trial court's decision

on a motion for summary disposition. *Spiek v. DOT*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998). This case involves a question of statutory interpretation, which this Court also reviews de novo. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich. 244, 250-251; 632 N.W.2d 126 (2001).

#### ANALYSIS

A person cannot commence an action for damages for injuries to a person or property unless the complaint is filed within the periods prescribed by MCL 600.5805. [\*\*6] *Gladych v New Family Homes, Inc*, 468 Mich. 594, 598; 664 N.W.2d 705 (2003). MCL 600.5805(1) provides:

[\*41] A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

The several subsections of MCL 600.5805 define periods of limitations for various types of actions to recover damages for injuries to persons or property.

Relevant to this case, MCL 600.5805(6) provides for a two-year period of limitations for actions charging malpractice, MCL 600.5805(10) provides a three-year period of limitations for general negligence actions, and MCL 600.5805(14) addresses the period of limitations for an action for damages involving a state-licensed architect and an improvement to real property.<sup>4</sup> The parties dispute the effect and proper interpretation of MCL 600.5805(14) and [\*\*7] MCL 600.5839(1).

4 MCL 600.5805 has been amended several times: the current subsection 6 was formerly subsection 4; the current subsection 10 was formerly subsection 8; and, the current subsection 14 was formerly subsection 10.

When interpreting statutes, "we presume that the Legislature intended the meaning clearly expressed . . . ." *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 402; 605 N.W.2d 300 (2000). Judicial construction is not required or permitted if the text of the statute is unambiguous. *Id*.

MCL 600.5805(14) was added to MCL 600.5805 in 1988. Subsection 5805(14) provides:

The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to

real property shall be as provided in section 5839.

[\*42] *MCL 600.5839(1)* in turn specifies a six-year [\*\*\*8] period of limitations that begins to run "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . ."

5 1988 PA 115.

*MCL 600.5839(1)* was enacted twenty years before *MCL 600.5805(14)*. \* *MCL 600.5839(1)* currently provides in full:

No person may maintain any action to recover damages for any injury to property. [\*\*593] real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after [\*\*\*9] the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Defendant contends that the six-year period of *MCL 600.5839(1)* is a statute of repose that operates in addition to the shorter periods of limitations in *MCL 600.5805(6)* and (10). In other words, defendant claims [\*43] that when an action arises within the six-year period specified by *MCL 600.5839(1)*, the periods of limitations in *MCL 600.5805* still apply. The Court of Appeals disagreed, however, holding that *MCL 600.5839(1)* is both a statute of limitations and a statute of repose so that an action for damages involving architects can be filed at any time within six years of the

occupancy of the completed improvement. [\*\*\*10]

6 1967 PA 203. As originally enacted, *MCL 600.5839(1)* did not provide a one-year discovery provision or the final ten-year period for gross negligence claims. These provisions were added by 1985 PA 188 at the same time the statute was expressly expanded to include contractors.

7 "A statute of repose limits the liability of a party by setting a fixed time after . . . which the party will not be held liable for . . . injury or damage . . . . Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs." *Frankennuth Mut Ins Co v Marlette Homes, Inc.* 456 Mich. 511, 513 n 3: 573 N.W.2d 611 (1998)(citation omitted).

This Court first addressed *MCL 600.5839(1)* in *O'Brien v Hazeler & Erdal*, 410 Mich. 1: 299 N.W.2d 336 (1980). In *O'Brien*, this Court upheld the constitutionality of *MCL 600.5839(1)* and [\*\*\*11] described the statute's operation as follows:

[T]he instant statute is both one of limitation and one of repose. For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing. [3]

Regarding the purpose of the statute, *O'Brien* stated: "The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement . . ."

8 *O'Brien, supra* at 15.

9 *Id.* at 14.

Despite *O'Brien's* statement "that *MCL 600.5839(1)* 'acts as a statute of limitations' for claims arising [\*44] within 'six years from occupancy, use, or acceptance [\*\*\*12] of the completed improvement,'" defendant argues that the six-year period provided [\*\*594] by *MCL 600.5839(1)* is merely a statute of repose that does not inhibit the application of the two-year period of limitations for malpractice claims or the three-year period of limitations for negligence actions of *MCL 600.5805 (6)* and (10).

10 *Id.* at 15.

For this argument, defendant relies on *Witherspoon v Guilford*, 203 Mich. App. 240; 511 N.W.2d 720 (1994). *Witherspoon* addressed whether the six-year period under MCL 600.5839(1) precludes the application of the three-year period of limitations of the current MCL 600.5805(10) "where the cause of action arises within six years after the use or acceptance of the improvement." " *Witherspoon* concluded that subsection 14 was added to MCL 600.5805 merely to "underscore [the Legislature's] intent [\*\*\*13] to grant § 5839 primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of § 5839." " *Witherspoon* further concluded that to apply MCL 600.5839(1) exclusively of the shorter periods of limitations in MCL 600.5805 would render portions of MCL 600.5805 nugatory.

11 *Witherspoon*, *supra* at 246.

12 *Id.*

Although *Witherspoon* correctly recognized that the current MCL 600.5805(14) and MCL 600.5839 "set forth an emphatic legislative intent to protect architects, engineers, and contractors from state claims," we find no evidence that through the enactment of MCL 600.5805(14) the Legislature intended MCL 600.5839(1) to merely serve as a statute of repose. Regarding which period of limitations applies to renovations [\*\*\*14] to real property and the liability of a state-licensed [45] architect who furnished the design for the renovations, there is no ambiguity in the language of either MCL 600.5805(14) or MCL 600.5839(1). " MCL 600.5805(14) unambiguously provides that "[t]he period of limitations for an action against a state licensed architect . . . shall be as provided in section 5839."

13 *Id.* at 247.

14 Cf. *Michigan Millers Mut Ins Co v West Detroit Bldg Co. Inc.* 196 Mich. App. 367; 494 N.W.2d 1 (1992), concluding that the effect of MCL 600.5805(14) on MCL 600.5839(1) was ambiguous on a different question than that presented by this appeal. *Michigan Millers* concluded that MCL 600.5805(14) was ambiguous regarding whether the Legislature intended that the six-year period of MCL 600.5839(1) be applied to all actions based on improvements to real property, both third-party actions and actions for professional malpractice. The panel examined the legislative history and held that the Legislature intended that MCL 600.5839(1) did apply to both types of claims.

[\*\*\*15] Because defendant is a state-licensed

architect that furnished the design for the improvements to the real property that allegedly caused plaintiff's injury, under MCL 600.5839(1) the period within which plaintiff can "maintain any action to recover damages for . . . bodily injury" is six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . ."

Moreover, it does not render any portion of MCL 600.5805 nugatory to hold that MCL 600.5839(1) is, as it plainly appears on its face, both a statute of repose and a statute of limitations. The periods of limitations of MCL 600.5805 for malpractice and general negligence actions remain applicable to any claim that does not involve "a state licensed architect, professional engineer, land surveyor, or contractor" and that is not "based on an improvement to real property . . ." MCL 600.5805(14).

Finally, our interpretation is not in conflict with the policies underlying MCL 600.5839(1) that this Court identified in *O'Brien*, *supra* at 16: [\*\*\*16]

[\*46] [\*\*595] By enacting a statute which grants architects and engineers complete repose after six years rather than abrogating the described causes of action *in toto*, the Legislature struck what it perceived to be a balance between eliminating altogether the tort liability of these professions and placing no restriction other than general statutes of limitations upon the ability of injured plaintiffs to bring tort actions against architects and engineers. The Legislature could reasonably have concluded that allowing suits against architects and engineers to be maintained within six years from the time of occupancy, use, or acceptance of an improvement would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors.

As stated in *O'Brien*, "[t]he power of the Legislature to determine the conditions under which a right may accrue and the period within which a right may be asserted is undoubted." *Id.* at 14.

#### CONCLUSION

We hold that MCL 600.5805(14) unambiguously directs that the period of limitations for actions against architects is [\*\*\*17] provided by MCL 600.5839(1). Moreover, the six-year period of MCL 600.5839(1) operates as both a statute of limitations and a statute of repose. Therefore, plaintiff's action for damages, brought well within this time period, is not time-barred. The

Court of Appeals decision is affirmed and this case is remanded to the circuit court for further proceedings. To the extent that the Court of Appeals decision in *Witherspoon*, *supra*, is inconsistent with this opinion, it is overruled."

15 We note that *Witherspoon* appears to have been the "first out" under *MCR 7.215(J)(1)* on the precise question of statutory interpretation presented in this case. However, our decision to overrule *Witherspoon* to the extent that it is inconsistent with our decision resolves any conflict on the question.

[\*47] Clifford W. Taylor

Michael F. Cavanagh

Elizabeth A. Weaver

Maura D. Corrigan

Robert P. Young, Jr.

[\*\*\*[8] Stephen J. Markman

CONCUR BY: Marilyn Kelly

CONCUR

KELLY, J. (concurring).

I concur with the majority in this case that the applicable limitations period is six years as stated in *MCL 600.5839(1)*. I write separately to explain the difference between my decision in this case and my concurrence in *Stanislowski v Calculus Constr Co. Inc.* unpublished opinion per curiam of the Court of Appeals, issued April 7, 1994 (Docket No. 145467).

When I penned my concurrence in *Stanislowski* I was bound by *Witherspoon v Guilford*, 203 Mich. App. 240; 511 N.W.2d 720 (1994). See *MCR 7.215(J)(1)*. Now that I am in the position to overturn *Witherspoon* and see the wisdom of doing so, I join in the decision reached by the Court in this case.

Marilyn Kelly

## **EXHIBIT 5**

SHIRLEY WITHERSPOON, as personal representative of the estate of LaRON  
GAMBLE, deceased, Plaintiff-Appellant, v. MICHELLE GUILFORD, Defendant-  
Appellee, and ADRIAN FENCE CO., INC., Defendant-Appellee.

Docket Nos. 151019, 152499

Court of Appeals of Michigan

203 Mich. App. 240; 511 N.W.2d 720; 1994 Mich. App. LEXIS 7

November 10, 1993, Submitted January 18, 1994, Decided

**DISPOSITION:**

[\*\*1] Affirmed.

**LexisNexis(R) Headnotes**

**COUNSEL:**

*Goodman, Eden, Millender & Bedrosian* (by Robert A. Koory), for Shirley Witherspoon.

*Montagne, Schmidt, Matthews & Belanger* (by Leland T. Schmidt), for Michelle Guilford.

*Bullen, Moilanen, Klaasen & Swan, P.C.* (by Terry J. Klaasen), for Adrian Fence Co., Inc.

**JUDGES:**

Brennan, P.J., and Reilly and R. J. Danhof, \* JJ.

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

**OPINIONBY:**

DANHOF

**OPINION:**

[\*241] [\*\*721] Plaintiff appeals as of right two circuit court orders dismissing her wrongful death lawsuit as barred by the statute of limitations. On appeal, plaintiff asserts that her claim against defendant Adrian Fence Company was timely filed because the six-year limitation provided by MCL 600.5839; MSA 27A.5839 applies rather than the three-year limitation imposed by MCL 600.5805(8); MSA 27A.5805(8). Plaintiff secondly argues that her claim against defendant

Michelle Guilford was not barred because Guilford fraudulently concealed her negligent involvement in the accident. We affirm.

[\*242] I

This case arose from an automobile accident that occurred on November 6, 1988, in the City of Adrian. LaRon Gamble, plaintiff's decedent, [\*\*2] was traveling east on West Maumee Road (Business Route US 223). As his vehicle entered a sharp left curve, it veered to the right, struck a guardrail, became airborne, and crashed into a tree. Defendant Adrian Fence Company had constructed and installed the guardrail, completing the installation in October 1988.

Defendant Guilford was traveling west on West Maumee at the time of the accident. Initially a witness for plaintiff in plaintiff's suit against the Michigan Department of Transportation, Guilford testified at an August 26, 1991, deposition that she had seen decedent's car cross into her lane before veering off the road. However, two accident reconstruction experts, on the basis of the skid marks left by decedent's car in the eastbound lane, testified that decedent had not in fact left his lane, but had applied maximum brakeage in a probable response to perceived danger, and that the resultant locking of the brakes caused his car to continue straight as the road curved. The experts theorized that the perceived danger was Guilford herself, who saw decedent cross over into "her" lane because she was driving in the center lane, or even the eastbound lane, thus causing the accident. [\*\*3] Two other witnesses who had been traveling west on West Maumee testified that shortly before they came upon the scene of the accident, they had been passed by a small dark-colored car in the center lane, traveling at excessive speed, which because of the time and distance involved must have had something to do with the accident. Guilford had driven a dark blue Ford Escort. Plaintiff [\*243] [\*\*722] named Guilford along with Adrian Fence in a separate suit for

negligence.

Plaintiff's complaint was mailed on November 4, 1991, but not filed with the court until November 7, 1991. Adrian Fence filed a motion for summary disposition pursuant to *MCR 2.116(C)(7)*, claiming that plaintiff's claims were barred by the three-year statute of limitations for death or injury actions, *MCL 600.5805(8)*; *MSA 27A.5805(8)*. Guilford joined in that motion. Plaintiff amended the complaint to include allegations of fraudulent misrepresentation against Guilford. To Adrian Fence, plaintiff responded that the applicable statute was *MCL 600.5839*; *MSA 27A.5839*, which places a six-year limitation on actions against architects, professional engineers, and contractors. The trial court granted defendants' motions, ruling first that [\*\*\*4] the six-year limitation provided by *MCL 600.5839*; *MSA 27A.5839* did not extend the three-year limitation provided by *MCL 600.5805(8)*; *MSA 27A.5805(8)*, and second, that plaintiff had not set forth a case of misrepresentation because there was no evidence that, at the time of the accident, Guilford had been driving in any but the westbound lane.

## II

When reviewing a motion for summary disposition pursuant to *MCR 2.116(C)(7)*, this Court must accept the plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff. If there are no facts in dispute, the question whether the claim is statutorily barred is one of law for the Court. *Smith v Quality Const Co*, 200 Mich App 297, 299; 503 NW2d 753 (1993).

At issue in the case against Adrian Fence is the relationship between *MCL 600.5805(8)*; *MSA [244] 27A.5805(8)* and *MCL 600.5839*; *MSA 27A.5839*. Section 5805 limits the viability of actions for injuries to persons or property; subsection 8 provides that the general period of limitation for negligence actions is three years. The limitation period begins to run when all the elements of the cause of action have occurred [\*\*\*5] and can be alleged in a proper complaint. *MCL 600.5827*; *MSA 27A.5827*; *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 149-151; 200 NW2d 70 (1972).

By a 1988 amendment, § 5805 also directs attention to *MCL 600.5839*; *MSA 27A.5839*:

(10) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

Section 5839 provides in pertinent part:

(1) No person may maintain any

action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, [\*\*\*6] or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional [245] engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

As originally enacted in 1967, n1 this statute protected only architects and engineers, and limited the actionable period to six years after the time of occupancy, use, or acceptance of the improvement. The purpose of the statute was to relieve those professionals of open-ended liability for alleged defects in their workmanship. *O'Brien v Hazelet & [723] Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980). The effect of the statute was one of both limitation and repose:

For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. [\*\*\*7] When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing. [*Id.* at 15.]

n1 1967 PA 203.

The statute was amended in 1985 to extend to contractors the protection afforded architects and engineers, n2 and to permit extension of the six-year

limitation applicable to ordinary negligence claims by a one-year discovery provision applicable to gross negligence claims, with a final limitation of ten years. *Beauregard-Bezu v Pierce*, 194 Mich App 388, 390-391; 487 NW2d 792 (1992). The Legislature [\*246] later added § 5805(10) n3 to underscore its intent to grant § 5839 primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of § 5839. *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc.* 196 Mich App 367, 375-378; 494 NW2d 1 (1992); [\*\*\*8] Senate Fiscal Agency Analyses, SB 478, October 21, 1987, and June 22, 1988. Thus, through the addition of § 5805(10), § 5839 applies to all claims against architects, engineers, or contractors for injuries arising from improvements to real property, whether involving the original or third parties, and whether based on tort or contract. *Michigan Millers* at 378. Once the applicable period under § 5839 has passed, a claim is conclusively barred. *Smith, supra* at 299-300; *Michigan Millers, supra*. It is clear then, that were an injury to arise from an alleged defect in an improvement more than six years after use or more than one year after discovery, § 5805(8) would not create for the would-be plaintiff an extended or additional period of viability notwithstanding § 5839. *Id.*

n2 1985 PA 188. Until that time, contractors were protected only by the three-year general period of limitation. Because a cause of action could accrue under that provision regardless of when the alleged design or construction defect occurred, contractors were left vulnerable to suits in cases where an architect or engineer would otherwise have been the party sued. See Senate Analyses, SB 278, July 2, 1985, and December 20, 1985.

n3 1988 PA 115.

[\*\*\*9] What is less clear is whether the six-year period applicable to ordinary negligence under § 5839 precludes application of § 5805(8) where the cause of action arises within six years after use or acceptance of the improvement. In other words, recognizing that § 5839 is a specific statute of limitations, which normally controls over a general statute of limitations, *Michigan Millers, supra* at 374, the question is whether § 5839, in tandem with § 5805(10), renders § 5805(8) inapplicable. We hold that it does not.

The primary purpose of courts in interpreting statutes is to discover and give effect to the intent [\*247] of the Legislature. *Michigan Millers* at 372-373. Where the statutory language is clear and unambiguous, no interpretation is necessary. If statutory language is

ambiguous, or where reasonable minds may differ, a reasonable construction must be given in light of the purpose of the statute. *Id.* at 373. Statutes of limitation will be construed to advance the policy that they are designed [\*\*\*10] to promote. Among the purposes of statutes of limitation are to prevent stale claims and to relieve defendants of the protracted fear of litigation. *Id.* at 373-374.

We understand § 5839, together with § 5805(10), to set forth an emphatic legislative intent to protect architects, engineers, and contractors from stale claims. However, because we must interpret the statute as a whole, reading each section in harmony with the rest of the statute, *Michigan Millers, supra*, we do not understand those provisions to expand the general three-year period of viability for injury claims under § 5805(8) to a six-year period insofar as the claims apply to those protected by § 5839. While it is [\*\*724] possible, as plaintiff argues, that the Legislature intended to expand the period of liability as a "trade-off" for the protection afforded by the provision, we find no hint of such an intent in the provision itself or elsewhere. Moreover, our adoption of this interpretation would necessarily render § 5805(8) nugatory in such cases, an effect that this Court must avoid in construing statutes. *Id.* Because the Legislature in enacting these provisions [\*\*\*11] did not clearly indicate that it intended through § 5839 to breathe additional life into claims that would otherwise have expired under § 5805(8), we choose not to read that intention into the statute.

We thus find that the trial court properly [\*248] granted summary disposition for defendant Adrian Fence Company pursuant to MCR 2.116(C)(7).

### III

Plaintiff also contends that the trial court wrongly granted defendant Guilford's motion for summary disposition because plaintiff presented a genuine issue of material fact concerning her claim that Guilford fraudulently concealed that she caused LaRon Gamble's accident.

MCL 600.5855; MSA 27A.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of

limitations.

Generally, for fraudulent [\*\*\*12] concealment to postpone the running of a limitation period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. *Draws v Levin*, 332 Mich 447, 452; 52 NW2d 180 (1952); *Stroud v Ward*, 169 Mich App 1, 8; 425 NW2d 490 (1988).

We note that the evidence of Guilford's misrepresentation is entirely conjectural. However, accepting pro forma as true all of plaintiff's allegations, we find that the trial court properly granted defendant Guilford's motion for summary disposition. [\*249]

Guilford gave her account of the accident to the police within minutes after it occurred, and her name and description are included in the police report, with which plaintiff subsequently became familiar. Plaintiff was thus aware that Guilford was at the scene of the accident when it occurred, and her identity and potential for liability were therefore discoverable from the outset.

#### IV

We affirm the trial court's grant of summary [\*\*\*13] disposition to both defendants pursuant to MCR 2.116(C)(7).

Affirmed.

**SHIRLEY WITHERSPOON, as Personal Representative of the Estate of LARON  
GAMBLE, Deceased, Plaintiff-Appellant, v. MICHELLE GUILFORD and ADRIAN  
FENCE CO., INC., Defendants-Appellees.**

**SC: 98798, 98799**

**SUPREME COURT OF MICHIGAN**

*447 Mich. 979; 525 N.W.2d 451; 1994 Mich. LEXIS 2271*

**October 5, 1994, Entered**

**PRIOR HISTORY:**

[\*1] COA: 151019, 152499. LC: 91-005166-NI

**JUDGES:**

Michael F. Cavanagh, Chief Justice, Charles L. Levin,  
James H. Brickley, Patricia J. Boyle, Dorothy Comstock  
Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate  
Justices

**OPINION:**

Order

On order of the Court, the application for leave to  
appeal is considered, and it is DENIED, because we are  
not persuaded that the questions presented should be  
reviewed by this Court.

## **EXHIBIT 6**

# SENATE BILL No. 882

September 30, 2009, Introduced by Senator SANBORN and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled  
"Revised judicature act of 1961,"  
by amending section 5839 (MCL 600.5839), as amended by 1985 PA 188.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Sec. 5839. (1) AN ACTION AGAINST A STATE LICENSED ARCHITECT,  
2       PROFESSIONAL ENGINEER, CONTRACTOR, OR LICENSED SURVEYOR IS SUBJECT  
3       TO THE APPLICABLE PERIODS OF LIMITATION AS PROVIDED IN THIS  
4       CHAPTER. HOWEVER, THIS SECTION ALSO APPLIES TO AN ACTION AGAINST A  
5       STATE LICENSED ARCHITECT, PROFESSIONAL ENGINEER, CONTRACTOR, OR  
6       LICENSED SURVEYOR AS AN ADDITIONAL LIMITATION.

7       (2) ~~(1) No~~ A person ~~may~~ SHALL NOT maintain any action to  
8       recover damages for any injury to property, real or personal, or



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383  
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Senate Bill 882 (as reported without amendment)  
Sponsor: Senator Alan Sanborn  
Committee: Judiciary

(as passed by the Senate)

Date Completed: 10-28-09

### **RATIONALE**

A 2006 decision of the Michigan Supreme Court has raised concerns about the length of time a person has to bring a lawsuit against an architect, professional engineer, or contractor. In *Ostroth v Warren Regency, GP, LLC*, the Court addressed the interaction of Sections 5805 and 5839 of the Revised Judicature Act which, respectively, impose a statute of limitations and a statute of repose (also called a period of limitations and a period of repose). (A statute of limitations limits the period of time an action may be brought after an injury or damage occurs or is discovered. A statute of repose sets a fixed time following an event, other than the injury or damage, after which a person cannot be held liable for injury or damage. When the period of repose expires, an action may not be brought even if the injury or damage has not yet occurred.) Traditionally, lawsuits against architects and engineers have been subject to the two-year statute of limitations on malpractice actions under Section 5805, and suits against contractors have been subject to the section's three-year statute of limitations on general negligence actions. As amended in 1988, however, Section 5805 specifies that the period of limitations for an action against an architect, professional engineer, or contractor, based on an improvement to real property, is as provided in Section 5839. Under that section, as a rule, a person may not bring an action arising out of the defective and unsafe condition of an improvement to real property, against an architect, professional engineer, or contractor later than six years after the time of occupancy or acceptance of the completed improvement.

In *Ostroth*, the Supreme Court held that Section 5839 functions as *both* a statute of limitations and a statute of repose. As a result, injured parties have six years after the completion of an improvement to real property to bring an action against an architect, professional engineer, or contractor, regardless of whether the two- or three-year period of limitations under Section 5805 otherwise would have barred the action. Some people believe that this case contradicts the public policy against preventing stale claims and is creating confusion and instability in the legal environment for the design and construction industry. It has been suggested, therefore, that the *Ostroth* decision should be reversed in statute.

### **CONTENT**

The bill would amend Section 5839 of the Revised Judicature Act to provide that an action against a State-licensed architect, professional engineer, contractor, or licensed surveyor would be subject to the applicable period of limitations as provided in Chapter 58 (Limitation of Actions), but Section 5839 also would apply to an action against a State-licensed architect, professional engineer, contractor, or licensed surveyor as an additional limitation.

(Under Section 5839, a person may not maintain an action to recover damages for injury to real or personal property, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, against any State-licensed architect or professional engineer performing or furnishing the design or supervision of construction of the



# HOUSE REPUBLICAN POLICY OFFICE

**Bill:** SB 882 (Sanborn) – Civil procedure; statute of limitations/repose for architects, engineers, and contractors; revise.

**Advisor:** Bruce A. Timmons, Legal Counsel

**Date:** June 29, 2010

**Committee:** House Judiciary Committee

## BILL ANALYSIS

### SHORT SUMMARY:

- **SB 882 (Sanborn)** – Civil procedure; liability; revise and limit statute of limitations/repose for architects, engineers, land surveyors, and contractors.

### ISSUE / PROBLEM:

The interplay of MCL 600.8505 and 600.5839 is one tortured history – involving legislation in 1986, 1988, 2000, and 2002 and a myriad of court decisions before, during, and since. The current bill is apparently intended to undo a state Supreme Court decision – Ostroth v Warren Regency, 474 Mich 36 (2006) – a case in which all 7 justices supported the decision (which affirmed the Court of Appeals and reversed the trial judge). The Supreme Court overruled an earlier appellate decision: Witherspoon v Guilford, 203 Mich App 240 (1994).

MCL 600.8505 sets the statute of limitations for tort actions, including:

2 years for malpractice and certain assaults.

3 years after the death or injury to a person or property (if not otherwise stated). (Negligence generally.)

3 years for a product liability action.

"As provided in section 5839" for an action against a state licensed architect, professional engineer, land surveyor, or contraction based on an improvement to real property".

MCL 600.5839 is generally considered a statute of repose for architects, engineers, land surveyors, and contractors (dating back to a 1967 PA). An injured party must bring an action no later than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement or 1 year after the defect is discovered or should have been discovered, but not later than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. (If the building or bridge collapses 11 years after the project is completed, a claim for damages is barred.)

In Ostroth, plaintiffs sued in November, 2000, for personal injuries sustained from alleged environmental hazards arising from a renovation project at their workplace (during April-August, 1998) for which defendants served as the architectural firm. The trial court held that MCL 600.8505(6) – the 2-year malpractice SOL – applied and barred the lawsuit. The Court of Appeals reversed, holding that the 6-year SOL in MCL 600.5839 applied. On appeal, defendants argued that if a claim arises within 6 years, the shorter periods of §5805 apply. The Supreme Court disagreed and held that MCL 600.5839 was both a statute of limitations (**due to the wording in §8505**) and a statute of repose and thus the 6-year period applied.

Last Session, the Senate passed SB 865(S-3) to try to clarify both §5805 and §5839, intending to restore the shorter periods for the SOL under §8505 and establish a 6-year statute of repose under §5839. SB 882 was reported from the House Judiciary Committee Nov. 12, 2008, but it died on the House Calendar. **SB 882** is the successor to last Session's SB 865 but different. It does not amend §8505 – and that may cause a problem. SB 882 passed the Senate without amendment 36-0 on Dec. 1, 2009.

### BILL CONTENT:

**SB 882**, as passed by the Senate, would:

- Amend §5839 to provide that a claim cannot be brought against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property unless the action is either:
  - (a) Brought within 6 years after the time of occupancy of the completed improvement; or
  - (b) Brought within 1 year after the defect is discovered or should have been discovered but not more